

contract was content the lady should eject him without a declarator: and that *beneficium non confertur in invitum*; as, *et volenti non fit injuria*.

REPLIED,—that just as in clauses irritant for not payment of a feu-duty there is a necessity of a declarator, though dispensed with, even so here. ALLEGED, There was a disparity, because in clauses irritant that are provided by an express law of feus, there is necessity for a declarator by reason of their importance, tending to take away heritage: but in conventional clauses irritant, betwixt master and tenants, there is no necessity; but the master may *brevi manu* eject, it being so provided betwixt them, especially where there is no third party lesed by the ejection.

The Lords assoilyed from the ejection, in respect of the contract. It was also alleged that the Countess had accepted of a part of the tack-duty after the committing of the clause irritant; which they found she might do without prejudice of the ejection.

Act. Nisbet.

Alt. Gilmour.

MS. folio 51.

1662. *January 1.*

BRAID *against* JO. BRAID.

ONE Braid pursuing a declarator of escheat on the crime of adultery committed by his brother, Jo. Braid; ALLEGED, No declarator because no escheat for adultery unless the party had been convicted of the crime before an assise in a Criminal Court: *ita est*, there is no doom produced against the defender, bearing him to be convicted; *igitur*, Reply not relevant, because, by the act of Parliament, any man that is found guilty of adultery, his escheat falls; but the defender has not only taken a remission, but has made his repentance before the kirk, and judicially confessed the same.

The Lords found neither his confession before the kirk, nor his repentance for that crime, was relevant in law to make his escheat fall; yea not his remission: and generally found no ecclesiastic confession of any crime relevant to infer any punishment in their body, far less in their estate; lest men, for fear either of their life or estate, should be hardened in their sin, and scared from confession. Which was well decided. *Referente Domino Stair.*

Act. Yeoman. *Alt.* Chalmers.

MS. folio 51.

1662. *January 1.* Colonel LOUTHIAN *against* THOMAS FAIRHOLME.

COLONEL LOUTHIAN *against* Thomas Fairholme. Mr. Williamsone having drawn a bill on Fairholme to pay L.500 Sterling to Louthian, he did neither accept nor refuse it, but sent his man to him with 1000 merks, as he alleged, in lent money. Louthian, as if he had accepted the bill of exchange, gave him a discharge or receipt in part of payment of the money contained in the bill, which Fairholme's servant brought to him from the Colonel; yet since declares he had

no warrant from his master to take it. Fairholme, on the sight of this receipt bids him quickly return it to the Colonel, and take another receipt, as of borrowed money, which the Colonel refused. When this came to be debated, it was found to be an acceptance of the bill, and Fairholme was decerned to pay the whole sum, because of the exuberant faith in bills of exchange.

Act. Sinclair. *Alt.* Maxwell.

MS. folio 51.

1662 *November 12.* Lord BURGHIE *against* LAFODDIE in Fyffe.

IN a case betwixt thir parties, found that a base charter of kirk-lands clad with possession, but not confirmed till long after the possession, is preferable to a public infeftment confirmed before; and that in respect the base infeftment was clad with possession long before the other's confirmation, and that but interruption: and that the subsequent confirmation of the base right, though posterior to the other's public confirmation, was drawn back to the date of the base seasine clad with possession, as said is.

Act. Cunyghame. *Alt.* Nisbet.

MS. folio 51.

1662. *November 15.* THOMAS NICOLSONE *against* GEORGE BALFOUR of Balbirnie.

MUTUAL molestations being pursued by Mr. Thomas Nicolsone and George Balfour of Balbirnie of either of their possessions of the Mure of Bigtie, adjoining to both their lands: Mr. Thomas being infest in Pittenthass *cum pastura et libero introitu et exitu*; the other being infest in Markincsh *cum communi pastura in mora de Bughtie*:

The Lords found Mr. Thomas his infestment, with forty years possession in the said mure by pasturing, relevant; but because Balbirnie alleged he was *per expressum* infest in that mure, and had interrupted Mr. Thomas *via facti* from pasturing, &c. therefore they ordained Mr. Thomas to prove forty years possession before the alleged time of Balbirnie's interruption: and they inclined that if Balbirnie had raised a declarator of property, or right on his infestment, he might have debarred Mr. Thomas. But the judgment being possessory, they sustained Mr. Thomas his interest *cum communi pastura*, he proving *ut supra*.

Act. Nisbet and Balfour.

MS. folio 51.

1662. *November 15.* BURNET *against* _____.

IN this case, found that an executor pursuing for a debt owing to the defunct testator, who was neither merchant, venturer, nor factor: and the debtor alleging